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Josh Voorhees, State Bar No. 241436
Rachel Doughty, State Bar No. 255904
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

Attorneys for Plaintiff
LAURENCE VINOCUR

ENDORSED
FILED
ALAMEDA COUNTY

DEC 27 2013

CLERK OF THE SUPERIOR COURT
M. Salcido, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

LAURENCE VINOCUR,

Plaintiff,

v.

KIDS II, INC.; TOYS "R" US, INC.;
TARGET CORPORATION; and DOES 1-150,
inclusive,

Defendants.

Case No. RG 13-691256

ASSIGNED FOR ALL PURPOSES TO
JUDGE GEORGE C. HERNANDEZ, JR.,
DEPARTMENT 17

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

(Health & Safety Code section 25249.6 *et seq.*)

Complaint Filed: August 9, 2013

VIA FAX

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff LAURENCE
3 VINOCUR in the public interest of the citizens of the State of California to enforce the People’s
4 right to be informed of the presence of tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), a
5 toxic chemical found in nursing pillows and prop up pillows sold in California. TDCPP is a
6 toxic chemical that is used to treat polyurethane foam, which is used as padding or cushioning
7 in a variety of products.

8 2. By this Complaint, plaintiff seeks to remedy Defendants’ continuing failures to
9 warn California citizens about the risk of exposure to TDCPP present in and on nursing pillows
10 and prop up pillows manufactured, distributed, and offered for sale or use to consumers
11 throughout the State of California.

12 3. Detectable levels of TDCPP are commonly found in and on nursing pillows and
13 prop up pillows that Defendants manufacture, distribute, and offer for sale to consumers, many
14 of whom are infants and children, throughout the State of California. Individuals in California,
15 including infants and children, are exposed to TDCPP in the products through various routes of
16 exposure: (i) through inhalation when TDCPP is released from nursing pillows and prop up
17 pillows; (ii) through dermal exposure when TDCPP from nursing pillows and prop up pillows
18 accumulates in ambient particles that are subsequently touched by such individuals; and (iii)
19 through ingestion when such particles are brought into contact with the mouth.

20 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
21 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of
22 doing business shall knowingly and intentionally expose any individual to a chemical known to
23 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
24 warning to such individual” Health & Safety Code § 25249.6.

25 5. TDCPP has been used in consumer products as an additive flame retardant since
26 the 1960s. In the late 1970s, based on findings that exposure to TDCPP could have mutagenic
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1 effects, the United States Consumer Product Safety Commission banned the use of TDCPP in
2 children's pajamas.

3 6. Pursuant to Proposition 65, on October 28, 2011, California identified and listed
4 TDCPP as a chemical known to cause cancer. TDCPP became subject to the "clear and
5 reasonable warning" requirements of the Act one year later on October 28, 2012. Cal. Code
6 Regs. tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 & 25249.10(b).) TDCPP is referred
7 to hereinafter as the "LISTED CHEMICAL."

8 7. Defendant KIDS II, INC. ("KIDS II") manufactures, distributes, imports, sells,
9 and/or offers for sale in California:

- 10 a. Nursing pillows containing the LISTED CHEMICAL;
- 11 b. The *Mombo Deluxe Pillow*, #7091, O2472 (#0 74451 07091 2);
- 12 c. Prop up pillows containing the LISTED CHEMICAL; and
- 13 d. The *Bright Stars Spots & Stripes Safari Gym*, #9167, O2612 (#0 74451
14 09167 2).

15 8. Defendant TOYS "R" US, INC. ("TOYS "R" US") manufactures, distributes,
16 imports, sells, and/or offers for sale in California:

- 17 a. Nursing pillows containing the LISTED CHEMICAL; and
- 18 b. The *Mombo Deluxe Pillow*, #7091, O2472 (#0 74451 07091 2).

19 9. Defendant TARGET CORPORATION ("TARGET") manufactures, distributes,
20 imports, sells, and/or offers for sale in California:

- 21 a. Prop up pillows containing the LISTED CHEMICAL; and
- 22 b. The *Bright Stars Spots & Stripes Safari Gym*, #9167, O2612 (#0 74451
23 09167 2).

24 10. All such nursing pillows containing the LISTED CHEMICAL shall hereinafter be
25 referred to as the "NURSING PILLOW PRODUCTS" and all such prop up pillows containing the
26 LISTED CHEMICAL shall hereinafter be referred to as the "PROP PILLOW PRODUCTS."
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1 11. Although KIDS II and TOYS “R” US expose infants, children, and other people
2 to the LISTED CHEMICAL in the NURSING PILLOW PRODUCTS, Defendants KIDS II and
3 TOYS “R” US provide no warnings about the carcinogenic hazards associated with these
4 TDCPP exposures. Defendants’ failures to warn consumers and other individuals in the State of
5 California not covered by California’s Occupational Health Act, Labor Code section 6300 et
6 seq. about their exposures to the LISTED CHEMICAL in conjunction with Defendants’ sales of
7 the NURSING PILLOW PRODUCTS, is a violation of Proposition 65, and subjects Defendants
8 to enjoinder of such conduct as well as civil penalties for each violation. Health & Safety
9 Code § 25249.7(a) & (b)(1).

10 12. Although KIDS II and TARGET expose infants, children, and other people to the
11 LISTED CHEMICAL in the PROP PILLOW PRODUCTS, Defendants KIDS II and TARGET
12 provide no warnings about the carcinogenic hazards associated with these TDCPP exposures.
13 Defendants’ failures to warn consumers and other individuals in the State of California not
14 covered by California’s Occupational Health Act, Labor Code section 6300 et seq. about their
15 exposures to the LISTED CHEMICAL in conjunction with Defendants’ sales of the PROP
16 PILLOW PRODUCTS, is a violation of Proposition 65, and subjects Defendants to enjoinder
17 of such conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a)
18 & (b)(1).

19 13. As a result of Defendants’ violations of Proposition 65, PLAINTIFF seeks
20 preliminary and permanent injunctive relief to compel Defendants to provide purchasers or
21 users of the NURSING PILLOW PRODUCTS and PROP PILLOW PRODUCTS with the
22 required warning regarding the health hazards of the LISTED CHEMICAL in the NURSING
23 PILLOW PRODUCTS and PROP PILLOW PRODUCTS. Health & Safety Code § 25249.7(a).

24 14. Pursuant to Health and Safety Code section 25249.7(b), PLAINTIFF also seeks
25 civil penalties against Defendants for their violations of Proposition 65.
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1 PARTIES

2 15. Plaintiff LAURENCE VINOCUR is a citizen of the State of California who is
3 dedicated to protecting the health of California citizens through the elimination or reduction of
4 toxic exposures from consumer products; and he brings this action in the public interest
5 pursuant to Health and Safety Code section 25249.7(d).

6 16. Defendants KIDS II, TARGET, and TOYS “R” US each is a person in the course
7 of doing business within the meaning of Health and Safety Code section 25249.11.

8 17. KIDS II and TOYS “R” US each manufactures, imports, distributes, sells, and/or
9 offers the NURSING PILLOW PRODUCTS for sale or use in the State of California, or implies
10 by its conduct that it manufactures, imports, distributes, sells, and/or offers the NURSING
11 PILLOW PRODUCTS for sale or use in the State of California.

12 18. KIDS II and TARGET each manufactures, imports, distributes, sells, and/or offers
13 the PROP PILLOW PRODUCTS for sale or use in the State of California, or implies by its
14 conduct that it manufactures, imports, distributes, sells, and/or offers the PROP PILLOW
15 PRODUCTS for sale or use in the State of California.

16 19. Defendants DOES 1-150 each is a person in the course of doing business within
17 the meaning of Health and Safety Code section 25249.11(b), which manufactures, distributes,
18 sells, and/or offers the NURSING PILLOW PRODUCTS and/or the PROP PILLOW
19 PRODUCTS for sale in the State of California. At this time, the true names and capacities of
20 defendants DOES 1 through 150, inclusive, are unknown to PLAINTIFF, who, therefore, sues
21 said defendants by their fictitious names pursuant to Code of Civil Procedure section 474.
22 PLAINTIFF is informed and believes, and on that basis alleges, that each of the fictitiously
23 named defendants is responsible for the acts and occurrences alleged herein. When ascertained,
24 their true names and capacities shall be reflected in an amended complaint.

25 20. KIDS II, TOYS “R” US, TARGET, and Defendants DOES 1-150 are collectively
26 referred to herein as “DEFENDANTS.”
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VENUE AND JURISDICTION

21. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction, because PLAINTIFF seeks civil penalties against DEFENDANTS, because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda County, and/or because Defendants conducted, and continue to conduct, business in this county with respect to the PROP PILLOW PRODUCTS and/or the NURSING PILLOW PRODUCTS.

22. The California Superior Court has jurisdiction over this action pursuant to California Constitution, article VI, section 10, which grants the Superior Court “original jurisdiction in all causes except those given by statute to other trial courts.” The statute under which this action is brought does not specify any other basis of subject matter jurisdiction.

23. The California Superior Court has jurisdiction over DEFENDANTS based on PLAINTIFF’s information and good faith belief that each DEFENDANT is a person, firm, corporation, or association that is a citizen of the State of California, has sufficient minimum contacts in the State of California, and/or otherwise purposefully avails itself of the California market. DEFENDANTS’ purposeful availment of California as a marketplace for the PROP PILLOW PRODUCTS and/or the NURSING PILLOW PRODUCTS renders the exercise of personal jurisdiction by California courts over DEFENDANTS consistent with traditional notions of fair play and substantial justice.

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FIRST CAUSE OF ACTION

(Violation of Proposition 65 - Against All Defendants)

24. PLAINTIFF realleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 24, inclusive.

25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986, the People of California expressly declared their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.”

1 26. Proposition 65 states, “[n]o person in the course of doing business shall
2 knowingly and intentionally expose any individual to a chemical known to the state to cause
3 cancer or reproductive toxicity without first giving clear and reasonable warning to such
4 individual” Health & Safety Code § 25249.6.

5 27. On April 10, 2013, PLAINTIFF’s sixty-day notice of violation, together with the
6 requisite certificate of merit, was provided to KIDS II, TOYS “R” US, and certain public
7 enforcement agencies stating that, as a result of KIDS II’s and TOYS “R” US’s sales of the
8 NURSING PILLOW PRODUCTS containing the LISTED CHEMICAL, purchasers and users
9 in the State of California were being exposed to the LISTED CHEMICAL resulting from their
10 reasonably foreseeable use of the NURSING PILLOW PRODUCTS, without the individual
11 purchasers and users first having been provided with a “clear and reasonable warning”
12 regarding such toxic exposures, as required by Proposition 65.

13 28. On July 12, 2013, PLAINTIFF’s supplemental sixty-day notice of violation,
14 together with the requisite certificate of merit, was provided to KIDS II, TOYS “R” US,
15 TARGET, and certain public enforcement agencies stating that, as a result of KIDS II’s and
16 TOYS “R” US’s sales of the NURSING PILLOW PRODUCTS containing the LISTED
17 CHEMICAL, purchasers and users in the State of California were being exposed to the LISTED
18 CHEMICAL resulting from their reasonably foreseeable use of the NURSING PILLOW
19 PRODUCTS, without the individual purchasers and users first having been provided with a
20 “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65,
21 and that as a result of KIDS II’s and TARGET’s sales of the PROP PILLOW PRODUCTS
22 containing the LISTED CHEMICAL, purchasers and users in the State of California were being
23 exposed to the LISTED CHEMICAL resulting from their reasonably foreseeable use of the
24 PROP PILLOW PRODUCTS, without the individual purchasers and users first having been
25 provided with a “clear and reasonable warning” regarding such toxic exposures, as required by
26 Proposition 65.

27 29. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
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1 and offering of the NURSING PILLOW PRODUCTS and/or the PROP PILLOW PRODUTS
2 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS'
3 violations have continued to occur beyond their receipt of PLAINTIFF's sixty-day notice of
4 violation and supplemental sixty-day notice of violation. As such, Defendants' violations are
5 ongoing and continuous in nature, and will continue to occur in the future.

6 30. After receiving PLAINTIFF's sixty-day notice of violation and supplemental
7 sixty-day notice of violation, the appropriate public enforcement agencies have failed to
8 commence and diligently prosecute a cause of action against DEFENDANTS under Proposition
9 65.

10 31. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
11 or use in California by DEFENDANTS contain the LISTED CHEMICAL such that they require
12 a "clear and reasonable" warning under Proposition 65.

13 32. DEFENDANTS knew or should have known that the PRODUCTS they
14 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED
15 CHEMICAL.

16 33. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
17 expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
18 inhalation during reasonably foreseeable use of the PRODUCTS.

19 34. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
20 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
21 defined by California Code of Regulations title 27, section 25602(b).

22 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
23 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact,
24 ingestion, and/or inhalation.

25 36. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
26 the reasonably foreseeable uses of the PRODUCTS would occur by DEFENDANTS'

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1 deliberate, non-accidental participation in the manufacture, importation, distribution, sale, and
2 offering of the PRODUCTS for sale or use to individuals in the State of California.

3 37. DEFENDANTS failed to provide a “clear and reasonable warning” to those
4 consumers and other individuals in the State of California who were or who would become
5 exposed to the LISTED CHEMICAL through dermal contact, ingestion, and/or inhalation
6 during the reasonably foreseeable uses of the PRODUCTS.

7 38. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
8 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
9 contact, ingestion, and/or inhalation resulting from the reasonably foreseeable uses of the
10 PRODUCTS sold by DEFENDANTS without a “clear and reasonable warning,” have suffered,
11 and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate
12 remedy at law.

13 39. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
14 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
15 for each violation.

16 40. As a consequence of the above-described acts, Health and Safety Code
17 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
18 Defendants.

19 **PRAYER FOR RELIEF**

20 Wherefore, PLAINTIFF prays for judgment against DEFENDANTS, and each of them,
21 as follows:

22 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess
23 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

24 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
25 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
26 offering the PRODUCTS for sale or use in California without first providing a “clear and
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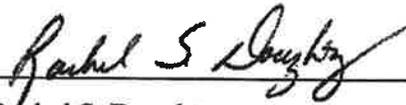
1 reasonable warning” as defined by California Code of Regulations title 27, section 25601 *et*
2 *seq.*, as to the harms associated with exposures the LISTED CHEMICAL;

3 3. That the Court grant PLAINTIFF his reasonable attorneys’ fees and costs of suit;
4 and

5 4. That the Court grant such other and further relief as may be just and proper.
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7 Dated: December 27, 2013

THE CHANLER GROUP

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9 By: 

10 Rachel S. Doughty
11 Attorneys for Plaintiff
12 LAURENCE VINOCUR
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